Zulkifli bin Ayob v Velasini a/p K Madhavan & Anor

HIGH COURT (KUALA TERENGGANU) — CIVIL APPEAL NO 12-22 OF 1996
ABDUL KADIR SULAIMAN J
13 NOVEMBER 1999

Damages (Personal injury or death) *— Fatal accident — Dependency claim — Pre 1984 amendment to s 7 of Civil Law Act 1956 — Whether pre-trial losses had to be deducted from multiplier for post-trial losses*

The appellant was involved in a motor accident in which the car driven by the appellant collided with the car driven by the second respondent, who had a passenger. The passenger succumbed to his injuries and died. The first respondent brought a claim against the appellant for damages pursuant to s 7 of the Civil Law Act 1956 ('the Act') for the benefit of the dependants of the deceased and was successful in obtaining damages from the appellant. The appellant being dissatisfied with the quantum awarded, appealed against the decision of the session court judge. At the hearing of the appeal, the appellant limited his appeal only to the quantum awarded in respect of the loss of support and pre-trial loss of support. The appellant contended that the amount awarded was manifestly excessive because the learned judge based his assessment on a higher multiplier and secondly, his failure to deduct from the loss of support, the period of pre-trial loss of support which amounted to 141 months.

At the time of his death, the deceased was 36 years old and earned a monthly income of about RM3,000 and the deceased adopted a daughter living with the deceased's family during the lifetime of the deceased. The accident happened on 10 August 1984 which was before the incorporation of s 7(3)(iv)(d) to the Civil Law Act 1956 effective from 1 October 1984 providing for a statutorily-fixed multiplier. The learned judge had decided that the loss of dependency was RM270,000 based on the formula of RM1,500 per month x 12 months x 15 years. From the date of death to the date of the disposal of the suit, a period of 141 months had lapsed and the learned judge multiplied that number of months with the monthly loss of dependency of RM1,500 giving a figure of RM211,500 without deducting it from the calculation of the loss of support.

Held, allowing the appeal:

(1) Under s 7 of the Act, only legally adopted children qualified as dependants. As no evidence was led that the adopted child of the family was a legally adopted child of the deceased, the sum of RM200 per month spent on the child ought to be deducted from the amount expended by the deceased towards her maintenance (see p 597H–598A); *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 followed. The unaccounted balance of RM450

was to be deducted together with RM100 being the expenses of the deceased in the household during his lifetime (see p 598F); *Ahmad Nordin bin Haji Maslan & Anor v Eng Ngak Hua & Ors* [1985] 2 MLJ 431 followed.

(2) With regard to the multiplier, taking the retirement age at 55 and as the deceased was 36 at the time of his death and with 1/3 to be deducted for contingencies, which was about 6 years, would leave the multiplier of 13 years. Therefore, the decision of the learned judge on the number of years' purchase would be varied and reduced to 13 years (156 months) instead of 15 years (see p 599B–D).

(3) The learned judge erred by not deducting the pre-trial loss of support from the global figure representing the total loss of support from the date of death of the deceased. In assessing the future loss of dependency in a fatal accident claim, the multiplier was to be calculated from the date of death and not the date of trial and the number of pre-trial years for which special damages were awarded was then to be deducted from the multiplier. The true figure for the future loss of support should be RM18,750 only being for a period of 15 months (156 months – 141 months pre-trial period) and the pre-trial loss should be RM176,250 on the basis of RM1,250 per month x 141 months (see pp 599D–600A); *Graham v Dodds* [1983] 2 All ER 953 and *Lee Ban Hoo & Anor v S Veeriah & Anor* [1982] 2 MLJ 188 followed.

[Bahasa Malaysia summary

Perayu terlibat di dalam kemalangan motor di mana kereta yang dipandu oleh perayu telah bertembung dengan kereta yang dipandu oleh responden kedua, yang mempunyai penumpang. Penumpang tersebut mengalami kecederaan dan meninggal. Responden pertama telah membuat tuntutan terhadap perayu untuk ganti rugi menurut s 7 Akta Undang-Undang Sivil 1956 ('Akta tersebut') bagi faedah tanggungan si mati dan telah berjaya mendapat ganti rugi daripada perayu. Perayu yang tidak berpuas hati dengan kuantum yang diawardkan, merayu terhadap keputusan hakim mahkamah sesyen tersebut. Di perbicaraan rayuan tersebut, perayu telah menghadkan rayuan beliau hanya kepada kuantum yang diawardkan berhubung dengan kehilangan penyara dan kehilangan penyara pra-perbicaraan. Perayu menegaskan bahawa amaun yang diawardkan dengan jelas berlebih-lebihan kerana hakim yang bijaksana telah membuat penilaian beliau berdasarkan pengganda yang tinggi dan keduanya, kegagalan beliau untuk memotong daripada kehilangan penyara, tempoh pra-perbicaraan kehilangan penyara yang berjumlah 141 bulan.

Pada ketika beliau meninggal, si mati berumur 36 tahun dan memperoleh pendapatan bulanan lebih kurang RM3,000 dan si mati telah mengambil seorang anak angkat perempuan yang tinggal dengan

keluarga si mati semasa hayatnya. Kemalangan tersebut berlaku pada 10 Ogos 1984 iaitu sebelum berkuatkuasanya s 7(3)(iv)(d) Akta Undang-Undang Sivil 1956 yang berkuat kuasa mulai 1 Oktober 1984 yang memperuntukkan satu pengganda yang telah distatut-tetapkan. Hakim yang arif telah memutuskan bahawa kehilangan penanggung adalah RM270,000 berdasarkan formula RM1,500 sebulan x 12 bulan x 15 tahun. Daripada tarikh kematian sehingga tarikh penyelesaian guaman tersebut, satu tempoh 141 bulan telah luput dan hakim yang arif telah menggandakan bilangan bulan dengan kehilangan penanggung secara bulanan sebanyak RM1,500 yang memberikan jumlah sebanyak RM211,500 tanpa memotongnya daripada pengiraan kehilangan penyara.

Diputuskan, membenarkan rayuan tersebut:

(1) Di bawah s 7 Akta tersebut, hanya anak angkat yang sah sahaja layak sebagai tanggungan. Oleh kerana tiada keterangan yang menunjukkan bahawa anak angkat keluarga tersebut merupakan seorang anak angkat yang sah si mati, jumlah RM200 sebulan yang dibelanjakan untuk kanak-kanak tersebut seharusnya dipotong daripada amaun yang dibelanjakan oleh si mati terhadap nafkah beliau (lihat ms 597H–598A); *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 diikut. Baki yang tidak dikirakan sebanyak RM450 perlu dipotong bersama dengan RM100 yang merupakan perbelanjaan si mati terhadap hal-hal rumah tangga semasa hayatnya (lihat ms p 598F); *Ahmad Nordin bin Haji Maslan & Anor v Eng Ngak Hua & Ors* [1985] 2 MLJ 43 diikut.

(2) Berhubung dengan pengganda tersebut, dengan mengambil kira umur persaraan adalah 55 tahun dan memandangkan si mati berumur 36 tahun ketika beliau meninggal dunia dan 1/3 perlu dipotong sebagai kontingensi untuk lebih kurang 6 tahun akan menjadikan pengganda sebanyak 13 tahun. Oleh demikian, keputusan hakim yang arif tentang bilangan tahun yang diperolehi akan berbeza dan dikurangkan kepada 13 tahun (156 bulan) dan bukan 15 tahun (lihat ms 599B–D).

(3) Hakim yang arif telah membuat kesilapan dengan tidak memotong kehilangan penyara pra-perbicaraan daripada jumlah keseluruhan yang mewakili jumlah besar kehilangan penyara daripada tarikh kematian si mati. Di dalam menaksirkan kehilangan penanggung pada masa hadapan di dalam suatu kemalangan yang membawa maut, pengganda seharusnya dikira daripada tarikh kematian dan bukan daripada tarikh perbicaraan dan bilangan tahun pra-perbicaraan di mana ganti rugi khas diawardkan akan dipotong daripada pengganda. Angka sebenar untuk kehilangan penyara pada masa hadapan sepatutnya adalah RM18,750 sahaja bagi tempoh 15 bulan (156 bulan – 141 bulan tempoh pra-perbicaraan) dan kehilangan pra-perbicaraan sepatutnya adalah RM176,250 berdasarkan RM1,250 sebulan x

141 bulan (lihat ms 599D–600A);); *Graham v Dodds* [1983] 2 All ER 953 dan *Lee Ban Hoo & Anor v S Veeriah & Anor* [1982] 2 MLJ 188 diikut.]

Notes

For cases on fatal accident, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2655–2688.

Cases referred to

Ahmad Nordin bin Haji Maslan & Anor v Eng Ngak Hua & Ors [1985] 2 MLJ 431 (folld)
Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233 (folld)
Graham v Dodds [1983] 2 All ER 953 (folld)
Lee Ban Hoo & Anor v S Veeriah & Anor [1982] 2 MLJ 188 (folld)

Legislation referred to

Civil Law Act 1956 s 7(3)(iv)(d)

Razlan Hadri (*Gan Ho & Razlan Hadri*) for the appellant.
M Govindarajoo (*Bazari & Assoc*) for the respondent.

Abdul Kadir Sulaiman J: In the court below, the appellant was the defendant in a negligence suit brought by the respondents/plaintiffs against him. The first respondent's claim was brought pursuant to s 7 of the Civil Law Act 1956 for the benefit of the dependants of the deceased, Mathavan a/l Kunjapoo. The car driven by the second respondent with the deceased as a passenger, was involved in a road collision with the car driven by the appellant resulting in the injuries to the respondents and the passenger succumbed to his injuries and died later in the hospital. By an order of 12 June 1996, the learned sessions judge after the hearing of the suit gave judgment against the appellant and made the following awards in favour of the first respondent in respect of the dependency claim, inter alia:

(a)	Loss of support	RM	270,000
(b)	Pre-trial loss of support	RM	211,500
(c)	Funeral expenses	RM	3,000
(d)	Interest at the rate of 4% pa in respect of item (b)	RM	8,460
	Total	RM	492,960

The appellant being dissatisfied with the quantum awarded, filed an appeal on 22 June 1996. The first respondent, however, did not appeal against the decision. At the hearing of the appeal, the appellant limited his appeal only to the quantum awarded in respect of items (a) and (b) above. It is contended for the appellant that the amount awarded was manifestly

excessive for the reason that the learned judge based his assessment on a higher number of years' purchase (or some people prefer to call it a multiplier) and secondly, his failure to deduct from item (a) the period of pre-trial loss of support amounting to 141 months which is the subject matter of item (b).

At the time of his death, the deceased was 36 years old. He was an independent contractor working with Petronas earning a monthly income of about RM3,000. This accident happened on 10 August 1984 which was before the incorporation of s 7(3)(iv)(d) to the Civil Law Act 1956 effective from 1 October 1984 providing for a statutorily-fixed number of years' purchase.

According to the evidence of the widow of the deceased, they had an adopted one year old daughter, Yogeethe d/o Vretheran, living with them during the lifetime of the deceased. Out of the deceased's monthly income the husband gave her a sum of RM2,000 per month to be disbursed for their household expenses and for the maintenance of his dependants. With that amount of money she paid RM150 per month towards their house rental, RM50 per month for water and electricity supply, RM200 per month for telephone bill, RM500 per month for the household food and drink, RM150 per month for clothings, RM200 per month towards the maintenance of their adopted daughter, and RM300 for the father of the deceased who was past 55 years old and was not staying with them, giving a total expenditure of RM1,550 per month in all. She further testified that she spent all the RM2,000 per month given to her by the deceased without anything left for saving. However, she did not explain in what manner and for what purpose she spent the balance of RM450 per month. The father did not give any evidence in the trial.

Based on the evidence, the learned judge decided that the loss of dependency was at RM1,500 per month. As the deceased died at the age of 36 years, the number of years' purchase was decided to be 15 years. In the circumstances, the loss of dependency is RM270,000 based on the formula of RM1,500 per month x 12 months x 15 years. No reason at all was given by the learned judge as to how he arrived at RM1,500 per month as the monthly loss of dependency and as to how he arrived at the figure of 15 years as the multiplier.

From the date of death to the date of the disposal of the suit, a period of 141 months has lapsed. So, the learned judge multiplied that number of months with the monthly loss of dependency of RM1,500 giving a figure of RM211,500 as stipulated in item (b) without explaining as to why this number of months prior to the trial was not deducted from the calculation in item (a).

Being a dependency claim under s 7 of the Civil Law Act 1956, the dependants for the purpose of the section are the wife, husband, parent and child of the deceased. An adopted child cannot be a dependant unless the child is a legally adopted child as otherwise a number of them could be brought in into the family and thereby becoming dependants of the deceased incurring a liability on a tortfeasor in assessing damages in respect

of a dependency claim. In this particular instance, there was no evidence led that Yogeethe d/o Vretheran, the adopted child of the family was a legally adopted child of the deceased. For that reason, the sum of RM200 per month spent on the child ought to be deducted from the RM2,000 expended by the deceased towards her maintenance leaving only the sum of RM1,800 per month to be reckoned with. In *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233, Peh Swee Chin SCJ said this at p 240I:

> Further, in our opinion, loss of support is for all practical purposes translated into financial loss sustained by a dependent. Having regard to the class of persons entitled as stated above, it is a logical conclusion to say that a plaintiff can only claim in such a case for financial loss which he sustains as a dependant and not in any other way.

Now, out of this balance of RM1,800, a total sum of RM1,350, according to the evidence of the widow, went towards the expenses of house rental, water, electricity and telephone bills, food, clothings and for the father of the deceased. Thereby leaving a further balance of RM450. This amount of money could not be accounted for by the wife apart from saying that she spent all the RM2,000 per month given to her leaving behind no saving. It could not, therefore, be said that this balance of RM450 went towards the support of the dependants for which the appellant tortfeasor to be held responsible to provide by way of damages. Therefore, up to that point only a sum of RM1,350 could be accounted for as being the support given by the deceased to his dependants. But does that truly represent the actual loss of support to the dependants on account of the death of the deceased? I do not think so, because that amount included also the amount expended by the deceased on himself by way of his contribution towards the house rental, the electricity, water and telephone bills, food and clothings. By his death, this contribution to himself would have ceased. The Supreme Court in *Ahmad Nordin bin Haji Maslan & Anor v Eng Ngak Hua & Ors* [1985] 2 MLJ 431 held that the amount of loss of support to the dependant of the deceased should exclude the expenses of the deceased in the household during his lifetime. See the dicta at p 435. Can then the amount of actual loss of support be easily quantified so as to provide a true monthly figure as representing the actual loss of support to the dependant wife and the father of the deceased in the present case? Even up to this point the figure arrived at by the learned judge as being RM1,500 per month as against the sum of RM1,350 being the loss of support cannot be sustained, leave alone providing no reason for coming to that conclusion.

However, in his submission, the learned counsel for the appellant was quite contented with the figure of RM1,250 per month as being a reasonable amount of loss of support to the dependants of the deceased. I would say the figure is reasonable in the circumstances in determining the loss of support to the wife and the father of the deceased on account of his death. A reduction of RM100 per month towards the deceased's own support is reasonable in the circumstances. I would therefore, accept the figure for purpose of calculating the loss of support.

The next issue is that of the multiplier. The learned judge in his judgment used a multiplier of 15 years. Again he failed to provide any

reason for coming to that conclusion. This according to the learned counsel for the appellant is slightly on the high side. He submitted that the multiplier should be 13 years instead. He based his argument on *Ahmad Nordin*. In that case the learned trial judge decided on a multiplier of 25 years in respect of the deceased who died at the age of 24 years. This was based on the probable retiring age of 65 years. The Supreme Court was of the view that the retiring age should be fixed at 55 and as the deceased was 24 at the time of his death and deducting 13 years for contingencies that would leave 18 years purchase. In the present case, the learned counsel for the appellant conceded on a conventional figure of $^1/_3$ to be deducted for contingencies taking into account that the deceased in this case was older than the one in the case cited. Taking out this number of years which is about 6 years for purpose of contingencies would leave the multiplier of 13 years. I would accept this submission by the learned counsel as being reasonable and fair in the circumstances, taking the contingencies of the wife remarrying and the father passing away. The wife was in her twenties at the material time. Therefore, the decision of the learned judge on the number of years' purchase be varied and reduced to 13 years (156 months) instead of 15.

Having determined the monthly amount of loss of support for the dependants and the number of years' purchase, the total amount would be RM195,000 based on the following formula of RM1,250 per month x 12 months x 13 years. This global figure would be distributed between the future loss of support and the pre-trial loss as itemized by the learned judge under items (a) and (b) in the impugned award respectively. Item (b) carries interest as distinct from item (a). It is common ground that the pre-trial period was 141 months. In the circumstances the amount arrived at under item (b) should be deducted from the global figure representing item (a) because items (a) and (b) represent the total loss of support from the date of death of the deceased due to the dependants under s 7 of the Civil Law Act 1956. This has not been done by the learned judge which is clearly erroneous. In *Graham v Dodds* [1983] 2 All ER 953, the House of Lords held that in assessing the future loss of dependency in a fatal accident claim the multiplier was to be calculated from the date of death and not the date of trial (as in a personal injury case where the injured person survived until trial), because there was no certainty what might have happened to the deceased if he had lived after the date of death, and there would otherwise be the undesirable anomaly that the dependants would recover more merely by delaying the date of trial. The multiplier was to be selected as at the date of death and the number of pre-trial years for which special damages were awarded was then to be deducted from the multiplier. This formula is being accepted by our court in *Lee Ban Hoo & Anor v S Veeriah & Anor* [1982] 2 MLJ 188 where a separate assessment was made for the loss of dependency from the date of death of the deceased to the date of judgment, and the loss of dependency from the date of judgment. In the circumstances, the award of the learned judge is varied to that extent. The true figure for item (a) being future loss of support should be RM18,750 only being for a period of 15 months (13 years – 141 months pre-trial

period) instead of RM270,000 and for item (b) being the pre-trial loss should be RM176,250 instead of RM211,500 on the basis of RM1,250 per month x 141 months. To that extend this appeal by the appellant is allowed with costs and the award of the learned judge is varied accordingly as regards items (a) and (b) respectively.

I have considered the submission by the learned counsel for the respondents. I see no merit at all in the submissions in that instead of defending the learned judge' s decision on the two types of award, he was submitting as if the respondents were the appellants in that he was questioning on the inadequacy of the award. As I mentioned earlier, the first respondent did not appeal against the decision of the learned judge. As the amount that the first respondent ought to have received is more than the award, he urged upon the court to dismiss this appeal of the appellant. On the issue of the multiplier, the learned counsel for the first respondent urged upon the court not to disturb the finding of the learned judge as he was free to determine the number of years' purchase which he had determined at 15 years. In answer to that I would say that while it is within the discretion of the learned judge of the first instant to determine the issue, this determination must be based on his judicial discretion. When a discretion is vested on any particular person, an appellate court will be slow to disturb that exercise of discretion, but when that discretion is not based on accepted legal principle such as this, the appellate court is not bound to close its eyes in the face of the wrong application of the principle in the exercise of the so called discretion. In fact, it is the duty of an appellate court to correct such wrong exercise of the discretionary power given by invoking its own discretion based on the correct principle to be applied. More so, in this case, the learned counsel agreed that based on the principle laid down in *Ahmad Nordin* the determination that the years' purchase in the present case be 13 is correct.

Appeal allowed.

Reported by Chin En Tek